Authored by William T. McCaffery, Esq., an 18 year industry professional and partner at one of New York's leading professional liability defense firms, "New York Legal Malpractice" provides claims professionals with a complete guide to common issues that arise in handling legal malpractice claims in New York.

New York Legal Malpractice

A Claim Professional's Guide

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New York Legal Malpractice:

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1. Attorney's Liability to Others

1.1 Liability to Clients

Rule:
In order to prevail in a legal malpractice action, plaintiff must establish the existence of an attorney-client relationship.

The existence of an attorney-client relationship does not require a formal retainer agreement or payment of a fee; there must be an explicit undertaking by the attorney to perform a specific task.

Authority:
"To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship….Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee (*see Hansen v. Caffry,* 280 A.D.2d 704, 720 N.Y.S.2d 258), a court must look to the words and actions of the parties to ascertain the existence of such a relationship (*see Tropp v. Lumer,* 23 A.D.3d 550, 806 N.Y.S.2d 599)." *Nelson v. Kalathara,* 48 A.D.3d 528, 529, 853 N.Y.S.2d 89, 90-91 (2d Dep't 2008).

"A plaintiff's unilateral belief does not confer upon him the status of client (*see, Jane St. Co. v. Rosenberg & Estis,* 192 A.D.2d 451, 597 N.Y.S.2d 17). Rather, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task [citations omitted]." *Volpe v. Canfield,* 237 A.D.2d 282, 283, 654 N.Y.S.2d 160, 162 (2d Dep't 1997).

1.2 Liability to Third-Parties

Rule:
An attorney is liable for malpractice to a third-party/non-client only if there is "near-privity" with the third-party.

Authority:
"Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence [citations omitted]." *Fredriksen v. Fredriksen,* 30 A.D.3d 370, 372, 817 N.Y.S.2d 320 (2d Dep't 2006).

"[B]efore a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity [citations omitted]." *Prudential Insurance Company of America v. Dewey, Ballantine,*

Bushby, Palmer & Wood, 80 N.Y.2d 377, 382, 605 N.E.2d 318, 320, 590 N.Y.S.2d 831, 833 (1992).

1.2.1 Liability to Beneficiaries

Rule:
In New York, attorneys are not liable in legal malpractice to the beneficiaries or the intended beneficiaries of a decedent's will.

Authority:
"The plaintiffs' status as beneficiaries of [the] will, and their mere claim that they instructed the defendants to draft the instrument in accordance with the decedent's expressed intentions, fail to suggest the existence between the parties of the type of relationship necessary to sustain this action." *Conti v. Polizzotto,* 243 A.D.2d 672, 663 N.Y.S.2d 293, 294 (2d Dep't 1997).

1.2.2 Liability to Executors/Estate

Rule:
An attorney can be liable to the executor of an estate to the extent the legal malpractice diminished the value of the estate.

Authority:
"We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Estate of Schneider v. Finmann,* 15 N.Y.3d 306, 309, 933 N.E.2d 718, 720, 907 N.Y.S.2d 119, 212 (2010).

1.2.3 Liability to Trustees and Receivers

Rule:
Upon a party's bankruptcy, any legal malpractice claim possessed by that bankrupt party becomes property of the estate in bankruptcy and the malpractice claim can be pursued by the trustee.

Authority:
"Whether the legal malpractice claim asserted in the complaint is viewed as having accrued prior to the filing of the bankruptcy petition, as the motion court held, or post-petition, as plaintiff contends, the claim is still the property of the bankrupt estate pursuant to the Bankruptcy Code (11 USC § 541 [a][1],[7]), and may not be maintained by plaintiff in his individual capacity (*In re Tomaiolo,* 205 B.R. 10; *see also In re C–Power Products,* 230 B.R. 800, 803; *In re Dow,* 132 B.R. 853, 859). Such a [cause of] action is

exercisable only by the trustee in bankruptcy." *Williams v. Stein,* 6 A.D.3d 197, 198, 775 N.Y.S.2d 255 (1st Dep't 2004).

1.3 Liability to Assignees of Claims

Rule:
Legal malpractice claims are assignable.

Authority:
"Pursuant to General Obligations Law § 13–101, all claims are assignable except those expressly prohibited. Those claims expressly prohibited do not include a claim for legal malpractice [citations omitted]. Thus, on the facts presented, the assignment would be neither a violation of public policy [citations omitted] nor the assignment of a claim to recover damages for personal injuries (*see*, General Construction Law § 37–a). Therefore, the assignment of the claims at issue does not violate General Obligations Law § 13–101." *Greevy by Greevy v. Becker, Isserlis, Sullivan & Kurtz,* 240 A.D.2d 539, 541, 658 N.Y.S.2d 693, 694-695 (2d Dep't 1997).

2. Necessary Elements of a Legal Malpractice Claim

Rule:
There are three necessary elements for a plaintiff to prove a legal malpractice case in New York: (1) negligence, (2) proximate cause, and (3) damages.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007).

2.1. Negligence

2.1.1. Standard of Care

Rule:
Negligence in a legal malpractice action is when an attorney fails to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007).

2.1.2. Ethical Violation/Violation of Disciplinary Rules

Rule:
An ethical violation or violation of a disciplinary rule alone does not give rise to a cause of action in legal malpractice.

Authority:
"[A]n ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law (*see, Drago v. Buonagurio,* 46 NY2d 778, 779-780 ['the courts have not recognized any liability of the lawyer to third parties (based on an ethical violation) where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability']). " *Shapiro v. McNeill,* 92 N.Y.2d 91, 97, 699 N.E.2d 407, 677 N.Y.S.2d 48 (1998).

2.2. Proximate Cause

2.2.1. "But For" Causation

Rule:
In order to establish the element of proximate cause, the plaintiff in a legal malpractice action must demonstrate that he/she would have prevailed or had a better result on the underlying matter "but for" the attorney's negligence.

Authority:
"To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007).

"Proximate cause requires a showing that 'but for' the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages [citation omitted]." *Barbara King Family Trust v. Voluto Ventures LLC,* 46 A.D.3d 423, 424, 849 N.Y.S.2d 41 (1st Dep't 2007).

2.2.2. Litigation Malpractice: The "Case Within a Case"

Rule:
In order to establish the element of causation in a legal malpractice action arising from an underlying litigation, the plaintiff must prove "a case within a case." In the context of the legal malpractice case, the plaintiff must prove that he/she would have prevailed in the underlying litigation.

Authority:
"In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that he or she would have succeeded on the merits of the underlying action but for the attorney's negligence [citations omitted]. Thus, in order to defeat summary judgment…plaintiff was required to demonstrate that she would have prevailed in her underlying personal injury action….This burden of proving 'a case within a case' is a heavy one [citation omitted]." *Aquino v. Kuczinski, Vila & Assoc., P.C.,* 39 A.D.3d 216, 218-219, 835 N.Y.S.2d 16 (1st Dep't 2007).

2.3. Damages

2.3.1. Measure of Damages

Rule:
Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost.

Authority:
"Damages in a legal malpractice action are designed 'to make the injured client whole' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 443, 867 N.E.2d 385, 388, 835 N.Y.S.2d 534, 537 (2007).

"The object of compensatory damages is to make the injured client whole. Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost [citations omitted]." *Campagnola v. Mulholland, Minion & Roe,* 76 N.Y.2d 38, 42, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990).

2.3.2. Need for Actual Damages

Rule:
Damages in a legal malpractice action must be real, actual, and ascertainable.

Authority:
"The damages claimed in a legal malpractice action must be 'actual and ascertainable' resulting from the proximate cause of the attorney's negligence [citations omitted]."

Zarin v. Reid & Priest, Esqs., 184 A.D.2d 385, 387-388, 585 N.Y.SW.2d 379 (1st Dep't 1992).

2.3.3. Collectability Requirement

Rule:
The extent of a legal malpractice plaintiff's damages will depend on the extent to which he/she could have collected on a judgment if one had been obtained in the context of the underlying action.

Authority:
N.B.: New York Courts are split between whether collectability is a necessary element of a legal malpractice action that must be proven by the plaintiff or whether it is an affirmative defense that must be established by the defendant. The First Department holds that collectability is an affirmative defense, whereas the Second Department holds that collectability is plaintiff's burden to establish.

"To the extent that *Larson v Crucet* (105 AD2d 651 [1984]) holds that proof of the collectability of the underlying judgment is an essential element of the plaintiff's cause of action for legal malpractice, we overrule that decision." *Lindenman v. Kreitzer,* 7 A.D.3d 30, 35, 775 N.Y.S.2d 4 (1st Dep't 2004).

To the contrary:

"The Supreme Court correctly determined that the plaintiff in this action to recover damages for legal malpractice bore the burden of establishing that a hypothetical judgment in the underlying action would have been collectible against the third-party debtor [citations omitted]." *Jedlicka v. Field,* 14 A.D.3d 596,597, 787 N.Y.S.2d 888 (2d Dep't 2005).

2.3.4. Recoverability of Legal Fees

Rule:
Legal fees for the prosecution of the legal malpractice action are not recoverable, but legal fees incurred in an effort to correct the attorney's negligence in the underlying matter may be recoverable.

Authority:
"A plaintiff's damages may include 'litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct' [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 443, 867 N.E.2d 385, 388, 835 N.Y.S.2d 534, 537 (2007).

2.3.5. Contingent Fee Offset

Rule:
There is no reduction in damages in the context of a legal malpractice action for a contingency fee that would have been paid by the plaintiff in the context of the underlying case.

Authority:
"We conclude that a reduction of the client's recovery should not be allowed in this case and for reasons of public policy, we decline to apply the traditional rules of contract damages to permit a negligent attorney to obtain credit for an unearned fee." *Campagnola v. Mulholland, Minion & Roe,* 76 N.Y.2d 38, 43, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990).

2.3.6. Emotional Distress/Mental Suffering

Rule:
No recovery for emotional distress or mental suffering/anguish is permitted in a legal malpractice action in New York.

Authority:
"A cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury [citation omitted]." *Wolkstein v. Morgenstern,* 275 A.D.2d 635, 637, 713 N.Y.S.2d 171 (1st Dep't 2000).

2.3.7. Punitive Damages

Rule:
Plaintiff must demonstrate a high degree of moral turpitude and wanton dishonesty in order to recover punitive damages.

Statutorily imposed treble damages are also available to a legal malpractice plaintiff under certain specific circumstances pursuant to Judiciary Law § 487.

Authority:
"[T]he claim for punitive damages should have been stricken as insufficient as a matter of law. The plaintiffs failed to allege facts demonstrating that the defendants' conduct was so outrageous as to evidence a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations (*see, Walker v Sheldon,* 10 NY2d 401, 405)." *Zarin v. Reid & Priest, Esqs.,* 184 A.D.2d 385, 388, 585 N.Y.SW.2d 379 (1st Dep't 1992).

Judiciary Law § 487:
An attorney or counselor who:
1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

2.3.8. Pre-Judgment Interest

Rule:
In New York a plaintiff in a legal malpractice action is entitled to pre-judgment interest, which runs at 9% per year, from the date of the malpractice.

Authority:
" 'CPLR 5001 operates to permit an award of prejudgment interest from the date of accrual of the malpractice action in actions seeking damages for attorney malpractice' [citations omitted]. In relevant part, CPLR 5001(b) provides: '[I]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.' " *Barnett v. Schwartz,* 47 A.D.3d 197, 208, 848 N.Y.S.2d 663, 671 (2d Dep't 2007).

3. Defenses

3.1. Statute of Limitations

Rule:
The statute of limitations to commence a legal malpractice action in New York is three years from the date of the malpractice. The statute can be tolled by the continuous representation doctrine (*see,* § 3.1.3 below).

Authority:
CPLR 214(6)
"The following actions must be commenced within three years:…6. an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort…."

3.1.1. Accrual Date

Rule:
In New York a cause of action for legal malpractice accrues on the date of the malpractice.

Authority:

"An action to recover damages arising from legal malpractice must be commenced within three years after accrual [citations omitted]. The action accrues when the malpractice is committed [citations omitted]. Causes of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies [citations omitted]." *Macaluso v. Del Col,* 95 A.D.3d 959, 960,944 N.Y.S.2d 589, 590 (2d Dep't 2012).

3.1.2. Discovery Rule

Rule:
In New York a claim for legal malpractice accrues when the malpractice is committed not when it is discovered.

Authority:

"Although the plaintiff did not discover that his attorneys' alleged advice was incorrect until years later, ' '[w]hat is important is when the malpractice was committed, not when the client discovered it' ' (*McCoy v. Feinman,* 99 N.Y.2d at 301, 755 N.Y.S.2d 693, 785 N.E.2d 714, quoting *Shumsky v. Eisenstein,* 96 N.Y.2d 164, 166, 726 N.Y.S.2d 365, 750 N.E.2d 67)." *Landow v. Snow Becker Krauss, P.C.,* 11 A.D.3d 795, 796, 975 N.Y.S.2d 119 (2d Dep't 2013).

3.1.3. Continuous Representation Doctrine

Rule:
The statute of limitations for a legal malpractice action is tolled until the conclusion of the attorney's representation.

Authority:
"The statute of limitations for legal malpractice is three years (*see* CPLR 214[6]). The limitations period may be tolled by the continuous representation doctrine ' 'where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim' ' [citations omitted]. 'For the doctrine to apply, there must be 'clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney' ' [citations omitted]. 'One

of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties' [citations omitted]." *Aseel v. Jonathan E. Kroll & Associates, PLLC,* 106 A.D.3d 1037, 1038, 966 N.Y.S.2d 202, 204 (2d Dep't 2013).

3.1.4. Tolling

3.1.4.1 On-Going Litigation

Rule:
On-going litigation will only toll the statute of limitations if the attorney accused of the malpractice continues to represent the client in that matter (*i.e.,* Continuous Representation Doctrine; *see,* § 3.1.3 above); otherwise, the statute begins to run from the date of the malpractice (*see,* § 3.1.1 above).

Authority:
"An action to recover damages arising from legal malpractice must be commenced within three years after accrual [citations omitted]. The action accrues when the malpractice is committed [citations omitted]. Causes of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies [citations omitted]." *Macaluso v. Del Col,* 95 A.D.3d 959, 960,944 N.Y.S.2d 589, 590 (2d Dep't 2012).

3.1.4.2 Fraudulent Concealment

Rule:
Under the doctrine of equitable estoppel, a defendant-attorney can be barred from asserting a statute of limitations defense (very rare).

Authority:
"Equitable estoppel is an 'extraordinary remedy' [citation omitted] which will 'bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing...which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding' [citation omitted]. A plaintiff seeking to invoke this doctrine must demonstrate subsequent, specific actions by defendant which kept plaintiff from timely bringing suit [citations omitted]. Plaintiffs must show the element of justifiable reliance on defendant's deception, fraud, or misrepresentations that effectively prevented the former from bringing suit in a timely fashion [citations omitted]." *Flaherty v. Attie,* 24 Misc.2d 1207(A), 890 N.Y.S.2d 369 (Sup. Ct. Qns. Cty. 2009).

"[P]laintiff adequately pleaded facts which, if proven, would establish the existence of an equitable estoppel[] in this case." *Lytell v.Lorusso,* 74 A.D.3d 905, 907, 903 N.Y.S.2d 98, 101 (2d Dep't 2010).

N.B.:
"[T]here is no independent cause of action for 'concealing' malpractice." *Zarin v. Reid & Priest, Esqs.,* 184 A.D.2d 385, 387, 585 N.Y.SW.2d 379 (1st Dep't 1992).

3.2. Privity

Rule:
An attorney is not liable to a non-client for legal malpractice unless there is near-privity or fraud, collusion, or malicious acts. (*See also,* § 1 above.)

Authority:
"Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence [citations omitted]." *Fredriksen v. Fredriksen,* 30 A.D.3d 370, 372, 817 N.Y.S.2d 320 (2d Dep't 2006).

3.3. Standing

Rule:
A plaintiff does not have standing to maintain a legal malpractice action if he lacks privity with the attorney or if the damages sustained are not his.

Authority:

"Plaintiff has no standing to assert the malpractice claims since there was no attorney-client relationship between him and [defendant] (*see, Lavanant v General Acc. Ins. Co.,* 164 AD2d 73, 81, *lv dismissed* 77 NY2d 939)." *Burton v. Rogovin,* 262 A.D.2d 72, 692 N.Y.S.2d 37 (1st Dep't 1999).

"[N]otwithstanding plaintiff's status as a 95% shareholder of Usheco, a closely held subchapter S corporation, he lacked standing to sue in his own name for injuries to the corporation [citations omitted]. *Schaeffer v. Lipton,* 243 A.D.2d 969, 970, 663 N.Y.S.2d 392 (3d Dep't 1997).

"The failure of a party to disclose a cause of action as an asset in a prior bankruptcy proceeding, which the party knew or should have known existed at the time of that proceeding, deprives him or her of 'the legal capacity to sue subsequently on that cause of action' [citations omitted]." *Potruch and Daab, LLC v. Abraham,* 97 A.D.3d 646, 647, 949 N.Y.S.2d 396 (2d Dep't 2012).

3.4. Professional Judgment Rule

Rule:
An attorney is not liable for legal malpractice simply because of an error in judgment.

Authority:
"[T]he 'selection of one among several reasonable courses of action does not constitute malpractice' [citations omitted]." *Zarin v. Reid & Priest, Esqs.,* 184 A.D.2d 385, 387, 585 N.Y.SW.2d 379 (1st Dep't 1992).

"While other options may have been available to defendants, their choice of one of several reasonable alternatives certainly does not amount to malpractice [citation omitted]." *Brook Plaza Opthalmology Associates, P.C. v. Fink, Weinberger, Fredman, Berman & Lowell, P.C.,* 173 A.D.2d 170, 171, 569 N.Y.S.2d 25 (1st Dep't 1991).

"Construing the third-party complaint liberally in favor of the third-party plaintiffs, it alleges no more than an error of judgment by [third-party defendant-attorney], which does not rise to the level of malpractice [citations omitted]." *Rosner v. Paley,* 65 N.Y.2d 736, 738, 481 N.E.2d 553, 492 N.Y.S.2d 13 (1985).

3.5. Subsequent Representation

Rule:
An attorney's representation cannot be deemed the proximate cause of a plaintiff's claimed damages if there was sufficient time for plaintiff or his/her subsequent attorney to protect plaintiff's interests.

Authority:
"The motion court properly determined that plaintiff failed to state a cause of action for legal malpractice. The documentary evidence established that plaintiff's successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights….Accordingly, defendants' alleged negligence cannot be considered a proximate cause of plaintiff's alleged injury [citation omitted]." *Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, P.C.,* 82 A.D.3d 652, 919 N.Y.S.2d 330 (1st Dep't 2011).

3.6. Speculative Damages

Rule:
Damages sought in a legal malpractice action must be actual and ascertainable and cannot be speculative.

Authority:
"[S]peculative damages cannot be a basis for legal malpractice (*Levine v. Lacher & Lovell–Taylor,* 256 A.D.2d 147, 681 N.Y.S.2d 503; *Price v. Herstic,* 240 A.D.2d 151, 657 N.Y.S.2d 700). Conclusory allegations of damages also are insufficient (*Lauer v. Rapp,* 190 A.D.2d 778, 593 N.Y.S.2d 843)." *Pellegrino v. File,* 291 A.D.2d 60, 63, 738 N.Y.S.2d 320, 323 (1st Dep't 2002).

"Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice (*see, Luniewski v. Zeitlin,* 188 A.D.2d 642, 591 N.Y.S.2d 524). Any damages alleged by the plaintiff must be 'actual and ascertainable' (*Zarin v. Reid & Priest,* 184 A.D.2d 385, 387–388, 585 N.Y.S.2d 379, *quoting Ressis v. Wojick,* 105 A.D.2d 565, 567, 481 N.Y.S.2d 507)." *Giambrone v. Bank of New York,* 253 A.D.2d 786, 787, 677 N.Y.S.2d 608, 609 (2d Dep't 1998).

3.7. Collectability

Rule:
The extent of a legal malpractice plaintiff's damages will depend on the extent to which he/she could have collected on a judgment if one had been obtained in the context of the underlying action.

Authority:
N.B.: New York Courts are split between whether collectability is a necessary element of a legal malpractice action that must be proven by the plaintiff or whether it is an affirmative defense that must be established by the defendant. The First Department holds that collectability is an affirmative defense, whereas the Second Department holds that collectability is plaintiff's burden to establish.

"To the extent that *Larson v Crucet* (105 AD2d 651 [1984]) holds that proof of the collectability of the underlying judgment is an essential element of the plaintiff's cause of action for legal malpractice, we overrule that decision." *Lindenman v. Kreitzer,* 7 A.D.3d 30, 35, 775 N.Y.S.2d 4 (1st Dep't 2004).

To the contrary:

"The Supreme Court correctly determined that the plaintiff in this action to recover damages for legal malpractice bore the burden of establishing that a hypothetical judgment in the underlying action would have been collectible against the third-party debtor [citations omitted]." *Jedlicka v. Field,* 14 A.D.3d 596,597, 787 N.Y.S.2d 888 (2d Dep't 2005).

3.8. Res Judicata/Claim Preclusion

Rule:
A legal malpractice action is subject to dismissal if the attorney has previously prevailed against the client on an action to recover his/her legal fee.

Authority:
Under New York State law, a determination fixing a defendant's fees in a prior action brought by the defendant against the plaintiff for fees for the same legal services which the plaintiff alleges were negligently performed, necessarily determines that there was no legal malpractice [citations omitted]. The determination awarding fees bars the claim sounding in legal malpractice pursuant to both the doctrine of res judicata and the doctrine of collateral estoppel [citations omitted]." *Breslin Realty Dev. Corp. v. Shaw,* 72 A.D.3d 258, 893 N.Y.S.2d 95 (2d Dep't 2010).

3.9. Collateral Estoppel/Issue Preclusion (and Innocence Requirement in Criminal Matters)

Rule:
A legal malpractice action is subject to dismissal if the ultimate issue in the case has previously been determined against the plaintiff.

A plaintiff cannot state a claim for legal malpractice arising from representation in a criminal matter unless and until the criminal conviction is vacated.

Authority
"To prevail in this legal malpractice action, plaintiff would have to show that but for defendant's negligence he would have obtained a better result in the underlying accounting action [citation omitted]. To make that showing, plaintiff would have to litigate the issues of which cases belonged to the alleged partnership between himself and the underlying plaintiff and the fees to which he was entitled. However, those issues were raised and decided against plaintiff in the underlying action [citation omitted], where he had a full and fair opportunity to litigate them, and he is precluded by the doctrine of collateral estoppel from re-litigating them in this action [citation omitted]." *Hirsch v. Fink,* 89 A.D.3d 430,431, 931 N.Y.S.2d 866, 867 (1st Dep't 2011).

"Contrary to the plaintiff's contention, he failed to state a cause of action to recover damages for legal malpractice against the defendant for the defendant's representation of him in a criminal action because, to date, he has not successfully challenged his criminal conviction and, thus, can neither assert nor establish his innocence [citations omitted]. Although an appeal from the Supreme Court's denial of a motion brought by the plaintiff pursuant to CPL article 440 is currently pending before this Court, the plaintiff will not have a cause of action to recover damages for legal malpractice against his former criminal

defense attorney unless he ultimately succeeds in his attempts to have the underlying conviction vacated and the indictment dismissed [citations omitted]." *Daly v. Peace,* 54 A.D.3d 801, 863 N.Y.S.2d 770 (2d Dep't 2008).

3.10. Effect of Prior Settlement

Rule:
Plaintiff can maintain a legal malpractice action despite the settlement of an underlying action if the underlying settlement was diminished due to the attorney's negligence.

Authority:
"A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel [internal quotation and citations omitted]." *Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.,* 21 A.D.3d 1082, 1083, 803 N.Y.S.2d 571 (2d Dep't 2005).

3.11. Prematurity

Rule:
A legal malpractice action can be stayed where the plaintiff's ultimate damages are not yet know because the underlying matter remains pending.

Authority:
"Since the client's remedies in the bankruptcy proceeding are uncertain, and since the client can have no cause of action for legal malpractice unless he would have had a remedy in the bankruptcy proceeding but for the attorney's negligence [citation omitted], we modify to stay the instant action until such time as the client's rights in the bankruptcy proceeding, and his contingent right to prosecute the underlying action, are finally settled." *Stettner v. Bendet,* 227 A.D.2d 202, 203, 642 N.Y.S.2d 253 (1st Dep't 1996).

3.12. Redundant/Duplicative Claims

Rule:
Causes of action asserted by a plaintiff in addition to a legal malpractice cause of action are subject to dismissal if they arise from the same facts and seek the same damages as the legal malpractice cause of action.

Authority:
"[T]he court did not err in dismissing [plaintiff's] breach of fiduciary duty and fraud claims, since they arise from the same facts as his legal malpractice claim and do not allege distinct damages [citations omitted]. However, the court should have also dismissed [plaintiff's] negligent misrepresentation and gross negligence causes of action, since these claims similarly arise from the same facts as his legal malpractice claim and are duplicative of that

cause of action [citations omitted]. [Plaintiff's] ninth cause of action for disgorgement of legal fees must also be dismissed since it too is predicated upon the same factual allegations as the malpractice claim, and seeks damages which may be recovered on that cause of action." *Mecca v. Shang,* 258 A.D.2d 569, 570, 685 N.Y.S.2d 458 (2d Dep't 1999).

4. Alternative Causes of Action

Rule:
Alternative causes of action are subject to dismissal if they arise from the same facts and seek the same damages as the legal malpractice cause of action (*see,* § 3.12 above).

Authority:
"[T]he court did not err in dismissing [plaintiff's] breach of fiduciary duty and fraud claims, since they arise from the same facts as his legal malpractice claim and do not allege distinct damages [citations omitted]. However, the court should have also dismissed [plaintiff's] negligent misrepresentation and gross negligence causes of action, since these claims similarly arise from the same facts as his legal malpractice claim and are duplicative of that cause of action [citations omitted]. [Plaintiff's] ninth cause of action for disgorgement of legal fees must also be dismissed since it too is predicated upon the same factual allegations as the malpractice claim, and seeks damages which may be recovered on that cause of action." *Mecca v. Shang,* 258 A.D.2d 569, 570, 685 N.Y.S.2d 458 (2d Dep't 1999).

4.1. Negligence

Rule:
A cause of action for negligence asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim (*see,* § 3.12 above).

Authority:
"[T]he Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing the plaintiff's…third cause of action to recover damages for negligent representation, since these causes of action arise from the same facts as his legal malpractice cause of action and are duplicative of that cause of action [citations omitted]." *Conklin v. Owen,* 72 A.D.3d 1006, 900 N.Y.S.2d 118, 119-120 (2d Dep't 2010).

4.2. Breach of Contract

Rule:
A cause of action for breach of contract asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim (*see,* § 3.12 above).

Authority:
"[T]he Supreme Court should have granted those branches of the defendants' motion which were for summary judgment dismissing so much of the first, third, and fifth causes of actions as alleged breach of contract as duplicative of the causes of action alleging legal malpractice, as they arose from the same facts and do not allege distinct damages [citations omitted]." *Alizio v. Feldman,* 82 A.D.3d 804, 805, 918 N.Y.S.2d 218, 219 (2d Dep't 2011).

4.3. Breach of Fiduciary Duty

Rule:
A cause of action for breach of fiduciary duty asserted in addition to a cause of action for legal malpractice will generally be subject to dismissal as duplicative of the legal malpractice claim (*see,* § 3.12 above).

Authority:
"[T]he plaintiff's causes of action alleging breach of contract, breach of fiduciary duty, and fraudulent misrepresentation were properly dismissed by the Supreme Court as they are duplicative of the legal malpractice cause of action. Those causes of action arise from the same facts as the malpractice claim, and do not allege distinct damages [citations omitted]." *Daniels v. Lebit,* 299 A.D.2d 310, 749 N.Y.S.2d 149 (2d Dep't 2002).

4.4. Fraud

Rule:
A separate cause of action for fraud may be viable if it arises from facts different from those that give rise to the legal malpractice cause of action or if it seeks damages that are different from the legal malpractice cause of action.

Authority:
"To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance [citations omitted]." *Pace v. Raisman & Associates, Esqs., LLP,* 95 A.D.3d 1185, 1188-1189, 945 N.Y.S.2d 118, 121-122 (2d Dep't 2012).

But See:

"The fraud claim was duplicative of the legal malpractice claim since it was 'not based on an allegation of independent, intentionally tortious' conduct [citation omitted] and failed to allege 'separate and distinct' damages [citation omitted]." *Carl v. Cohen,* 55 A.D.3d 478, 868 N.Y.S.2d 7 (1st Dep't 2008).

4.5. Aiding and Abetting

Rule:
Separate causes of action can be asserted for claims such as aiding and abetting a breach of fiduciary duty and aiding and abetting a fraud.

Authority:
"A cause of action for aiding and abetting breach of fiduciary duty merely 'requires a prima facie showing of a fiduciary duty owed to plaintiff, ... a breach of that duty, and defendant's substantial assistance ... in effecting the breach, together with resulting damages' [citations omitted]." *Yuko Ito v. Suzuki,* 57 A.D.3d 205, 869 N.Y.S.2d 28, 31 (1st Dep't 2008).

"In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud' [citations omitted]." *Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Insurance Company,* 64 A.D.3d 472, 476, 883 N.Y.S.2d 486, 490 (1st Dep't 2009).

4.6. Conspiracy

Rule:
New York does not recognize civil conspiracy to commit a tort as an independent cause of action absent an underlying actionable tort.

Authority:
" 'New York does not recognize civil conspiracy to commit a tort…as an independent cause of action' [citations omitted]. However, 'a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme' [citations omitted]. 'The allegation of conspiracy carries no greater burden, but also no less, than to assert adequately common action for a common purpose by common agreement or understanding among a group, from which common responsibility derives. Therefore, under New York law, [i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement. A bare conclusory allegation of conspiracy is usually held insufficient' [citation omitted]." *Blanco v. Polanco,* 116 A.D.3d 892, 986 N.Y.S.2d 151, 155 (2d Dep't 2014).

4.7. Conflict of Interest

Rule:
A claim of conflict of interest is an allegation of an ethical violation and an ethical violation or violation of a disciplinary rule alone does not give rise to a cause of action in legal malpractice (*see,* § 2.1.2 above).

Authority:
"[A]n ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law (*see, Drago v. Buonagurio,* 46 NY2d 778, 779-780 ["the courts have not recognized any liability of the lawyer to third parties (based on an ethical violation) where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability']])." *Shapiro v. McNeill,* 92 N.Y.2d 91, 97, 699 N.E.2d 407, 677 N.Y.S.2d 48 (1998).

4.8. Emotional Distress/Mental Suffering

Rule:
No recovery for emotional distress or mental suffering/anguish is permitted in a legal malpractice action in New York.

Authority:
"A cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury [citation omitted]." *Wolkstein v. Morgenstern,* 275 A.D.2d 635, 637, 713 N.Y.S.2d 171 (1st Dep't 2000).

5. Procedural Matters

5.1. Certificate/Affidavit of Merit Requirement

Rule:
No Certificate of Merit is required in order for a plaintiff to commence a legal malpractice action in New York.

Authority:
CPLR 3012-a: Certificate of Merit requirement is limited to medical, dental and podiatric malpractice actions.

5.2. Burdens of Proof

Rule:
Plaintiff has the burden of proof to establish the necessary elements of a legal malpractice claim. Defendant has the burden of proof on a motion for summary judgment.

Authority:
"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages [citation omitted]." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442, 867 N.E.2d 385, 387, 835 N.Y.S.2d 534, 536 (2007).

"For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of [the] essential elements [citations omitted]." *Shopsin v. Siben & Siben, Esqs.,* 268 A.D.2d 578, 702 N.Y.S.2d 610 (2d Dep't 2000).

5.3. Expert Testimony Requirement

Rule:
Expert testimony is generally required in order to establish an attorney's negligence.

Authority:
"Expert testimony is normally needed to establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, 'unless the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care' [citation omitted]." *Northrop v. Thorsen,* 46 A.D.3d 780, 782, 848 N.Y.S.2d 304, 308 (2d Dep't 2007)

5.4. Effect of Prior Settlement

Rule:
Plaintiff can maintain a legal malpractice action despite the settlement of an underlying action if the underlying settlement was diminished due to the attorney's negligence.

However, legal malpractice actions based upon underlying matrimonial actions are often dismissed as the allegations in the malpractice action are belied by the terms of the settlement.

Authority:
"A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel [internal quotation and citations omitted]." *Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.,* 21 A.D.3d 1082, 1083, 803 N.Y.S.2d 571 (2d Dep't 2005).

"Plaintiff's allegations in support of her legal malpractice claim were conclusory, speculative and contradicted by the documentary evidence submitted on the motion to dismiss. The trial judge in the underlying matrimonial action conducted a thorough allocution on the stipulation of settlement. Plaintiff acknowledged that she understood and agreed with the terms of the settlement and knew that it was a full and final agreement. She further stated that her attorney had answered her questions and that she was satisfied with the services he provided. Under these circumstances, the motion court properly dismissed the complaint (*see Weissman v Kessler*, 78 AD3d 465 [2010]; *Katebi v Fink*, 51 AD3d 424 [2008])." *Harvey v. Greenberg,* 82 A.D.3d 683, 919 N.Y.S.2d 519 (1st Dep't 2011).

About the Author

William T. McCaffery's practice concentrates in the area of legal malpractice defense. He represents attorneys and law firms that have been sued for legal malpractice in cases ranging from real estate and personal injury matters to complex business transactions and commercial litigation.

Prior to joining L'Abbate Balkan in 2001, Mr. McCaffery had a general practice in which he handled real estate transactions, business formations, commercial litigation, will drafting, and personal injury matters. Prior to his general practice, he was associated with two defense firms in New York City, where he defended Labor Law actions, dental malpractice actions, general liability claims and represented individuals, small businesses and large, self-insured corporations. This broad range of experience enables Mr. McCaffery to better represent his clients in the varied subject matter that arises in the context of legal malpractice actions.

Mr. McCaffery is the Vice President of the Long Island Chapter of the Claims and Litigation Management Alliance (CLM); he is a member of the New York State Bar Association, the Nassau County Bar Association, and the Chaminade Lawyers Association. He has co-authored the CLM *Claims Handling Guidelines* for New York, has written articles for publications such as the *New York Law Journal* and *Nassau Lawyer*, and is a regular speaker on matters of legal malpractice, professional liability, risk management, and litigation before insurance carriers and professional organizations such as the New York State Bar Association, the Suffolk County Women's Bar Association, and the Affiliated Lawyers of the Americas (ALTA).

He received his Juris Doctorate from St. John's University School of Law in 1996 and his undergraduate degree from the University of Scranton in 1993. He is admitted to practice law in the Courts of the State of New York and is admitted to the United States District Courts for both the Southern and Eastern Districts of New York.

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